SUPREME COURT OF THE UNITED STATES.

October Term, 1895. No. .

EX PARTE A. HOWARD RITTER, EXECUTOR OF WILLIAM M. RUNK, DECEASED.

Answer of the Mutual Life Insurance Company of New York to the petition for a writ of certiorari *requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court of the United States for its revision and determination the writ of error taken by A. Howard Ritter, executor of William M. Runk, deceased.*

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The answer of the Mutual Life Insurance Company of New York respectfully represents:—

This case was tried in the court below by the district judge, the Hon. William Butler. It was unanimously affirmed in the Circuit Court of Appeals by a court constituted of the two circuit judges, Hon. M. W. Acheson and Hon. George M. Dallas, and of the district judge, Hon. E. T. Green.

A unanimous decision of two circuit judges and of two district judges sustains the ruling.

The case of the Ætna Life Insurance Company *vs.* Florida is immaterial, in view of the fact that as the Missouri statute had settled the public policy of the State, no question of such policy could be raised, as a thing could not be said to be

against the public policy of a Commonwealth which was sustained by its legislation.

The decedent, Runk, secured enormous insurance upon his life at a time when he was insolvent and an embezzler, and when it was impossible for him to maintain payments of the moneys which, thereafter, would require to be periodically paid. It was apparent that his intention was to secure insurance for the purpose of liquidating the large sums which he had embezzled and which he owed. His letters, written before his death, conclusively established a fact which was not practically controverted by testimony, *i. e.*, that he was sane and meant to commit suicide for the expressed purpose of liquidating his defalcations and indebtedness out of the insurance moneys.

The brief submitted by the respondent in the Circuit Court of Appeals is attached hereto.

CHARLES P. SHERMAN,
JOHN G. JOHNSON,
Attorneys for Mutual Life Insurance Company of New York.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT.

A. Howard Ritter, executor of the estate of William M. Runk, deceased, Plaintiff in Error,	Of September Term, 1895.
vs.	
The Mutual Life Insurance Company of New York, Defendant in Error.	No. 2.

BRIEF FOR DEFENDANT IN ERROR.

I. COUNTER STATEMENT OF FACTS.

William M. Runk, until his death by suicide, on the 5th October, 1892, occupied a most respectable position in this city. He was the treasurer of several religious charities, and of the City Mission, and was a member of the firm of Darlington & Runk, which did a large business as retailers of dry goods.

Many years before his death he originated this firm, into which he put $100,000, borrowed, largely, from his aunt, Mrs. Barcroft. By the articles of partnership, he was obliged to allow this to remain, permanently.

He had borrowed from his aunt not only a part of his partnership contribution, but also securities to her belonging, which he had hypothecated. Anterior to November, 1891, he was indebted to her to the amount of about $135,000.

The insurance in controversy was issued on the 10th November, 1891. At the time of its issuance he does not appear

to have owned any property other than his interest in the firm, saving his country seat, very largely mortgaged, and the furniture therein. In point of fact, his interest in the firm was not, at that time, quite intact, because he had already commenced withdrawing money surreptitiously from the firm, which withdrawal he had concealed by causing the firm's indebtedness to divers creditors to appear settled, though the checks in their favor had been withheld. By this device the bank deposit did not appear overdrawn, despite the fact that he had checked thereon for his private benefit. (Record, 113.)

At that time, however, he was a defaulter, as treasurer of the City Mission, to the extent of between $50,000 and $86,000. This default had been brought about by his misuse of cash and securities to it belonging. Its securities had been pledged with various banks and trust companies as collateral security for his individual notes. Loans or bonds which he had collected and misappropriated were allowed to stand upon his books as if unpaid. Though Darlington & Runk, who, in 1885 or 1886 (Record, 55), had borrowed $20,000 from the City Mission upon their note, had refunded this amount to Runk, as treasurer, within a year, he had failed to cancel the note or to enter the cash he had received therefor to the credit of the mission. The exact time at which he commenced to appropriate the securities of the Mission was not fixed, but there was proof that there had been some misappropriations as early as 1886, and that they had continued for years, for as late as May 31st, 1889, Runk had misappropriated, by using as collateral for his individual notes, $6000 Philadelphia, Wilmington and Baltimore trust certificates belonging to the Mission. (Record, 62–4, 72–3.)

Mrs. Barcroft, as collateral security for her loan of about $135,000, held policies of insurance to a like amount on the life of Runk. In November, 1891, policies of insurance upon his life were outstanding, including those held by Mrs. Barcroft, to the extent of $315,000. The annual premiums thereon amounted to upwards of $12,000 per annum. By the articles of partnership Runk, who was living extravagantly, was allowed to withdraw but $700 per month.

In November, 1891, therefore, Runk was indebted to the extent of nearly $215,000, though he possessed tangible assets to no greater extent than an apparent interest of $100,000 in his firm.

At that time, being engaged in heavy stock gambling, which he continued until his death, he took out additional insurance upon his life, including $25,000 which was put in the name of his wife, to the extent of about $195,000, which entailed payment of an additional annual premium of nearly $8000. Such was his inability, at that time, to provide for this insurance, that he paid the annual premium upon the policy in the appellee company, by inducing one Pierce to become responsible therefor, upon his giving him part of what was required to be paid in cash, and the residue in store orders on Darlington & Runk, a portion of which remained unliquidated at the time of his death.

During the year following the taking out of the additional insurance, Runk met his stock-gambling losses by a continuance of the plan previously begun, *i. e.*, by drawing checks upon the firm's money in apparent settlement of creditor accounts; by causing these accounts to be entered as paid; and by keeping the bank balance in apparently proper condition, notwithstanding money surreptitiously drawn by him, upon his private account, by withholding these checks from the creditors.

Darlington was absent in Europe, leaving Runk in charge of the store, for some months, until the 28th September, 1892. Having heard from his bank, upon his return, something which excited his suspicion, he brought it to the attention of Runk, who partly admitted, and partly misrepresented, what he had done in the matter. Later, Darlington learned the entire truth, though Runk endeavored to deceive him as long as possible.

Until the day of his death, Runk continued at the store, attending to business. He was found in his stable, dead, on the evening of the 5th October, 1892, having left certain letters which were put in evidence, written on that or on the previous day. The longest of these letters (Record, 32–3–4–5) was

addressed to his executor, Ritter. In it he inclosed the fullest information as to his life insurance; as to his indebtedness; as to the amount of securities which had been misappropriated; and as to the manner in which his affairs were to be liquidated out of the insurance moneys. A portion of this letter read thus:—

MY DEAR FRIEND:—In one of the early clauses of my will I direct all my debts and loans shall be paid.

I will try to enumerate the indebtedness in the order to be paid.

First.—My account in the firm is overdrawn $86,000, which I want replaced with first insurance amounts that you receive.

Second.—I have left in the small closet in the safe a list of amounts I owe to make P. E. City Mission account good: $20,000 is in notes of $10,000 each signed by D. R. & Co., and endorsed Mary A. Barcroft; this I owe and please pay. Then several securities have matured and I owe for them as enumerated. These also are referred to. I have some in loan with Beneficial Saving Fund Society and Pa. Co., please redeem and restore.

Third.—I owe Mrs. Barcroft 96M $30,000, in securities for which she holds life insurance policies; please adjust these.

The 10,000 B. & P. Bonds are I think at Beneficial S. F.
12,000 N. & Western " " " Phila. S. F.
5,000 P. & R. " " " " "
5,000 " " $3,000. Kilbreth, Far. & Co., N. Y. Phila. office, C. D. Barney & Co.
$2,000. Tucker & Co., Phila.

Of course, the 126,000 or 128 will be arranged with insurance money.

A letter to one of his employees, Nice, to whom he had given directions to come to his house in the country, on the evening of the day he shot himself, read thus (Record, 59):—

LLANDEILO.

WILLIAM:—Do all you can for Mrs. Runk, and see that I have a quiet funeral. I am driven to this, but I have tried to be a friend to you. Don't talk to anyone.

Yours truly,

WILLIAM M. RUNK.

TUESDAY, October 6, 1892.

A letter to Mrs. Barcroft (Supplement, page 41) read thus:—

ST. DAVID'S, PA.,
LLANDEILO.

MY DEAR AUNT MARY:—Forgive me for the disgrace I bring upon you, but it is the only way I can pay my indebtedness to you. A. Howard

Ritter will attend to all my affairs with Evelyn. You have always told me my mind was not strong. I have been led astray, have been infatuated with speculation and lost. I worked too hard. I am wild but cannot recover now.

Thank you for all you have been to me in every way. Forgive.

Affectionately

WM.

TUESDAY Oct. 6, 92.

A letter to his partner, Darlington (Record, 53), read thus:—

MY DEAR JOSEPH:—I have grossly deceived you and can only pay my debts by my life. The Girard Bank is overdrawn $20,000, F. & M. $20,000, N. A. $18,000, Tradesmen's $16,000, Fourth Street, $6,000; $86,000.

To make these amounts good you will find checks drawn and not sent in Arthur's hands in compartment in the safe, my top corner closet, in an envelope. These checks with balance in each bank have kept showing fair to good. Howard Ritter is my executor, and I have given him instructions to make these $86,000 good from my first insurance payments.

The money on loans he is to pay also, and you may in Farr's small book charge to me. This is a sad ending of a promising life, but I deserve all the punishment I may get, only I feel my debts must be paid. This sacrifice will do it, and only this. I was faithful until two years ago. Forgive me. Don't publish this.

After Runk's death, it was found that the liquidation entailed the necessity of selling the stock in hand to the surviving partner at a discount of thirty per cent., and left him indebted to the latter, after all his interest in the firm had been appropriated, about $69,000. Upon this basis of liquidation his interest in the firm in November, 1891, would have been worth very much less than $100,000.

If all the insurance money be collected, it will little more than suffice to pay the unliquidated indebtedness. The amount due to the City Mission was paid, subsequent to the death of Runk, by Mrs. Barcroft, who took an assignment of its claim, after she had been able to liquidate the entire indebtedness due to herself, by collection of the policies of life insurance which she held.

At the time the additional policies were taken out by Runk, he signed an application in which, *inter alia*, he said (Record, 20):—

I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years.

A copy of this application was not attached to the policies, and there was no proof that it had ever been attached.

The insurer was a New York corporation, which promised to pay "at its home office in the State of New York" upon the death of Runk, in consideration of a recited annual premium then paid in advance and to be paid "thereafter to the com-"pany at its home office in the city of New York on the tenth "day of November in every year during the continuance of this "contract." (Record, 17.)

The policy was thus attested (Record, 18):—

In Witness Whereof, the said The Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary at its office in the city of New York.

The company, in New York, accepted the risk, and mailed the policy to its general agent. It was argued on behalf of the company that the contract was a New York contract, delivered in New York, and to be performed in New York. The learned judge, however, overruled this claim and refused to permit the application to be given in evidence.

We will not waste time by quoting from the testimony to show that it was not sufficient to establish unsoundness of mind at the time of the suicide. The jury found that it was not, and this court knows that such a verdict is alone possible under very exceptional circumstances. The only witnesses called in favor of the insanity theory were the wife and sister in law. Their testimony was of the most meagre and insufficient character. In reply to a question from the learned trial judge, the wife (Record, 124) answered thus:—

Q. It might be interesting to know whether you formed this opinion of his mental condition before his death? A. I noticed many things strange. Q. You have given us your judgment of his mental condition based on what you observed. Did you form the opinion which you have expressed that his mind was unbalanced before his death or afterwards? A. Afterwards. Q. Then the act of committing suicide had something to do with the conclusion you reached? A. It had.

No one was found, out of the large number of people, in the store and elsewhere, who had conversed and done business with Runk, during the last days of his life, to express an

opinion that he was insane. The little testimony offered by the appellant really established sanity. It amounted to proof of sanity, save the little distraughtness of manner, easily explained by the circumstances which existed.

II. APPELLEE'S ARGUMENT.

The appellant, by what he says, seeks to leave upon the mind of the court an impression that the learned trial judge felt that the case was one which required more study and argument than he was able to give to it, and that his conclusion was one which he dubiously entertained. Such impression, if left, would be erroneous. The learned trial judge felt the importance of the case, both because of the principle and of the amount of money involved. The only doubt, however, which he entertained, at the trial, was, whether his judgment ought not to be affected by decided cases to the contrary. He was so well satisfied, however, in the end, that there were no such cases, that when the matter came up for argument upon the motion for a new trial, he acquiesced in the suggestion of the learned counsel for the appellant, that it would not be worth while, as his convictions appeared to be settled, to consume time in further discussion. In consequence of the certainty of the conviction he then entertained, no argument was then had, and the motion was refused.

Again the appellant fails to convey to this court the real fact of the case, when he says that "the defense in the open-"ing was rested principally upon an allegation that the policies "had been obtained by Runk with a fraudulent intent," &c., and that the contention that there was a fraudulent intent in taking out the policies was abandoned because there was not a *scintilla* of evidence to support it.

The affidavit of defense (Record, 21) set up the defense of fraudulent intent in securing the policies as well as the defense ultimately submitted, alone, to the jury. It reads, *inter alia*, thus:—

On or about the fifth day of October, 1892, he deliberately committed suicide, intending to kill himself, at a time when he was of sound mind,

and in the full possession of his mental faculties. This suicide was not the result of mental unsoundness and was not occasioned by mental unsoundness. It was the deliberate act of a man mentally and morally able to understand all the consequences of his act.

Both defenses, as well as that growing out of the execution of the application, were opened by counsel. It is somewhat anomalous that the speech of counsel is returned as part of the record, though it forms no part thereof, whilst a very important piece of testimony, *i. e.*, the deposition of Mrs. Barcroft, is not.* The appellee has been compelled to print this as an appendix to its argument.

During the whole trial both defenses were sought to be established by evidence.

After all the testimony had been presented, and after points had been submitted by the defendant, including one which very clearly raised the defense of fraud in the inception of the insurance, in these words (Record, 150):—

If you find that Runk obtained the policies of insurance sued upon at a time when he was insolvent and an embezzler, with the intent thereby to secure, in case of his death, from the plaintiff, the fund with which to pay those to whom he was indebted, and whose property he had embezzled; that he subsequently committed suicide, whilst of sound mind, with the deliberate intent to carry out this scheme, there can be no recovery.

After consideration of these points, the learned trial judge suggested that under the view which he took of the law, it would seem unnecessary to submit more than one question of fact; that being of the opinion that the policies could not be recovered upon, if the jury should find that Runk, when of sound mind, deliberately killed himself, it was not necessary to embarrass them by the other question in the cause, viz., the intent at the inception. As he suggested, if the intent was fraudulent at the inception, but if the self killing by Runk was whilst insane, the defense would not be good; but if the self killing was whilst sane, the original intent was unimportant.

Under this suggestion, and not because of any idea that the evidence did not justify the submission of the fact, counsel for

* See Record, 57.

the defense withdrew the third point and conceded that the judge might put to the jury simply the question upon which he charged. There was no intention to abandon for lack of evidence, and, until the receipt of the appellant's paper book, no idea of such abandonment ever occurred.

The appellant argues three propositions, and we will reply under the heads thus defined by him :—

I. THERE WAS ERROR IN THE ADMISSION OF TESTIMONY TO SUPPORT THE DEFENSE THAT THE POLICIES WERE TAKEN WITH THE INTENT TO COMMIT SUICIDE, AND IN THE REFUSAL OF THE LEARNED JUDGE TO CHARGE, AS REQUESTED, THAT THERE WAS NO EVIDENCE WHICH WOULD WARRANT THE FINDING THAT THEY WERE THUS TAKEN.

II. THE APPELLANT WAS ENTITLED TO RECOVER, ALTHOUGH RUNK DELIBERATELY KILLED HIMSELF WHEN SANE, WITH THE INTENT TO SECURE THE AMOUNT OF THE POLICIES FOR THE BENEFIT OF HIS CREDITORS AND FAMILY.

III. THE LEARNED TRIAL JUDGE ERRED IN CHARGING WHAT CONSTITUTED INSANITY.

I. APPELLANT'S FIRST POINT, VIZ., THAT THERE WAS ERROR IN THE ADMISSION OF TESTIMONY TO SUPPORT THE DEFENSE THAT THE POLICIES WERE TAKEN WITH THE INTENT TO COMMIT SUICIDE, AND IN THE REFUSAL OF THE LEARNED JUDGE TO CHARGE, AS REQUESTED, THAT THERE WAS NO EVIDENCE WHICH WOULD WARRANT THE FINDING THAT THEY WERE THUS TAKEN.

As no exception was taken to the evidence of Hopper, no error can be assigned to its reception. It is not necessary, however, to press this point, in view of what is equally fatal and more substantial.

The testimony of Cullinan, as well as of Hopper, showing the desperate financial situation of Runk at the time he entered into the additional contracts of insurance, was not the first evidence upon that point which was offered. A very large amount of proof had been previously given, without any objection, concerning the financial situation of Runk.

Under our view of the entire competency of the evidence, it is hardly necessary to say that no motion to strike it out was ever made.

Can it be successfully argued, in view of the admission by the plaintiff that he could not succeed if Runk entered into the contract with the intent subsequently to kill himself, that evidence was not competent which showed that at the time the policies were issued, Runk was an embezzler, was insolvent, and was without means to maintain them?

Practically, the appellant puts the error which he thinks was made, upon the refusal of the learned trial judge to charge that the evidence was "not sufficient to warrant the jury in "finding that the deceased entered into the said contracts of "insurance with the intention of committing suicide."

It is almost impossible to prove a fraudulent intent by direct evidence of declarations as to its existence by the man accused of entertaining it. Those who intend to perpetrate a fraud do not publish the fact. Their intent can only be gathered from circumstances.

Was not a jury at liberty to infer a fraudulent design from the following facts?

Runk, absolutely insolvent, having embezzled nearly $85,000, obliged to pay annual premiums of about $12,000 on policies of insurance to the amount of $315,000, though he possessed no income other than the $700 per month he could only continue to draw so long as his defalcation should remain unknown, procured, about the 10th of November, 1891, policies to the extent of $195,000 additional, entailing the payment of an annual additional premium of about $8000, though obliged to make the first payment, by improperly drawn store orders upon his firm, which remained partly unsettled at the time of his death.

Is it conceivable that he put upon himself this additional burden of $8000 per annum, though without funds to keep up the insurance already existing, with no intention to bring the duty of payment to a speedy end? Within a year, with part of the premiums still unpaid, after writing letters in which he said he would kill himself in order that he might settle his

indebtedness and embezzlements, with the insurance moneys, he committed suicide. Would not the learned trial judge have done a gross injustice to the defendant, if he had charged that there was no evidence from which the jury might find an intent, at the time of taking out the policies, to defraud? It must be conceded that before the death there was a deliberate intent to render the insurance available by suicide. It was for the jury to say when this intent was first formed. Could they fairly have found, under the financial and other circumstances surrounding Runk at the time he secured the additional contracts, that he expected, for any considerable time, to pay the premiums? He must have known that he would be unable to raise the $12,000 with which to meet the premiums on existing policies. Is it likely that he would have entailed upon himself a great additional burden, if he expected long to carry it?

It is probable that when these additional policies were taken out Runk determined to embark upon a speculation which, if it succeeded, would enable him to liquidate his embezzlements and indebtedness, but which, if it failed, would entail upon those whom he wanted to protect, no loss greater than what would be covered by the insurance.

During the period following the additional contracts, he overdrew his account with the firm. With these overdrafts it is more than probable he met the speculative margins he was compelled to give. He took care, however, to keep the amount of his overdrafts within a limit which, with the addition of embezzlements and previous indebtedness, would not be in excess of the amount of his insurance.

The appellant says that it was evident, by the testimony of one Pierce, that he had urged the taking of the additional insurance upon Runk, and that he succeeded in placing it by an appeal to the vanity of the latter. In what way the idea of an additional insurance first originated, we know not, but we do not credit the suggestion that, under the shadow of the penitentiary, Runk's vanity was an active factor. It may be that a suggestion by Pierce started the plan; but Runk knew, what Pierce did not, that he was unable to pay the premiums, and that the additional insurance would be impossible to be

maintained saving during a very short term of life. The testimony of Pierce is utterly unreliable, as will appear by an examination of what he said with reference to an inability to induce Runk for some time to take the amount subsequently issued, although it appeared, by the signed application, that Runk, at that very time, had designated the method in which the total amount should be subdivided, and the amount of insurance to be issued in the name of his wife.

An amusing paragraph of the appellant's argument reads thus (page 10):—

> It is true that there was evidence of irregular conduct upon Runk's part, as treasurer of the City Mission, which ran back for a number of years prior to his death, but there was no evidence to justify the conclusion that in November, 1891, his embarrassments had in any way rendered him desperate, or even were calculated to cause despair; on the contrary, in November, 1891, Mr. Runk's interest in Darlington, Runk & Co. was much more than sufficient to pay his debt to the City Mission, and his only other debt—that to his aunt, Mrs. Barcroft—was then fully secured by life policies taken out many years before.

The security of a life policy is somewhat problematical. In case of a speedy death alone could it be good. In case of the continued existence of Runk, unable to keep up the premiums, it amounted to nothing. Without means sufficient to keep up the existing premiums, it is not likely, unless he contemplated fraud, that Runk would have entailed upon himself the necessity of paying a largely increased amount. In November, 1891, Runk owed his aunt about $135,000; had embezzled about $80,000 of the funds of the City Mission; and had fraudulently withdrawn some money from the firm. At that time he was desperately insolvent.

Nothing but what Runk long knew was inevitable occurred between him and Darlington. For years he must have known that he stood upon the brink of disclosure. He doubtless contemplated, for at least a year, the possibility of that happening which he meant to meet by mulcting the insurance companies.

The appellant lost nothing by the course taken under the suggestion of the learned trial judge. The issue of fraud at the inception of the policy was quite as likely to be decided against him by the jury as was that of Runk's soundness of

mind at the time of his suicide. Had the testimony been erroneously admitted, the course taken in the charge, which put to the jury only the question of soundness of mind, eradicated all the evil. We rest, however, upon our assertion that the testimony was properly admitted, in proof of an issue which, if established, was a vital one, and that it was not within the power of the learned trial judge to say that there was no testimony sufficient to warrant a finding of fraud in taking out the additional insurance.

In Smith *vs.* N. B. Society, 123 N. Y., 88, it was said :—

The declarations must be made at the time of the act done which they are supposed to characterize. They must be calculated to unfold the nature and quality of the facts which they are intended to explain, and they must so harmonize with those facts as to form one transaction. That transaction, the thing done, the fact put in issue, was the fraud which evidently was not a simple, but a compound and continuous fact, proceeding to its result by consecutive steps and separate acts having necessarily an origin, a progress and an ultimate result, involving not only the intent of the assured, but also his sanity, without which the responsible intent could not exist. This fraud, therefore, could be studied and proved all along the line, and in all its stages, from origin to culmination, formed part of the issue to be investigated. If in such a case declarations are excluded which are merely narrative of a past transaction, the residue, so far as pertinent to the issue, will generally and with few exceptions be admissible in evidence.

It is thus not difficult to decide that the proof of applications by Tyler to thirty-six different insurance companies, by which he secured $282,000 of insurance upon his life, and his letters and telegrams to relatives and friends written and sent as steps or agencies in the consummation of his purpose, and indicating a sane and deliberate intent to consummate the fraud, which for more than a year had been in preparation, by a final act of suicide, were all admissible. But some of the evidence was more remote and approached so near to the outside boundaries of the *res gestæ* as to require a specific and particular examination. * * *

The declaration accompanied and characterized an act which was itself admissible in evidence, for that act indicated the then desperate character of Tyler's financial situation, and the declaration explained the operation and effect of the fact upon his mind, its force and strength as a motive to the fraud, and the presence of a thought or contemplation of suicide in a contingency which did in fact occur. The evidence serves to indicate the origin and motive of the alleged suicidal intent which grew to be the effective agency of the fraud. * * * They were contemporaneous with the fraud in its formative stages; they accompanied Tyler's efforts to raise money, which failed, and to procure an insurance

upon his life which he knew he could not continuously maintain. They show the motive of the fraud and mark its progress, and harmonize so completely with all which afterward occurred as to constitute, with that, elements of the single transaction, the fraudulent conduct which raised the issue presented by the defense. And so I think the proof came fairly within the rule relating to the *res gestæ*, and did not transcend its limits.

Some of this evidence was resisted upon the ground that death by suicide was no defense under the terms of the policy. That is true; but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished. It was necessary, therefore, to prove it, and in such manner as to indicate that it was not an insane or sudden impulse, but the culmination and effective working out of a deliberately conceived purpose of fraud.

II. APPELLANT'S SECOND POINT, VIZ., THAT THE APPELLANT WAS ENTITLED TO RECOVER ALTHOUGH RUNK DELIBERATELY KILLED HIMSELF WHEN SANE, WITH THE INTENT TO SECURE THE AMOUNT OF THE POLICIES FOR THE BENEFIT OF HIS CREDITORS AND FAMILY.

We maintain the counter proposition, viz., that the personal representatives of a suicide cannot recover upon policies in his name, at his death, if the insured deliberately killed himself, when of sound mind, for the purpose of making the insurance money payable. Under these circumstances the insurance money is not recoverable because:—

1. Death for such cause is not within the meaning of the policy.

2. A contract providing for such a recovery would be against the policy of the law.

3. Suicide, under such circumstances, is a fraud upon the insurer.

1. Death by the deliberate act of the insured, whilst sane, is not within the meaning of the policy.

It has been sometimes said that life insurance is a bet, in which, in consideration of an uncertain sum to be paid to it, the insurer agrees to pay a certain sum upon the death of the

insured, to his personal representatives or nominees. If the insured lives long the insurer will win. If he lives but a short time, the insurer will lose. The latter, apprised by the tables of mortality, is able to form a fair judgment as to the average duration of life, and as to what it will be likely to receive in the way of premiums. Upon this information it bases its chances of success. The life of the insured may not reach the average. Accident and disease may prevent. All this is within the assumed risk, because, though one man does not live as long as is expected, another lives longer. No insurer would be willing to take the chance of the longevity of the insured, with the understanding that it would lose though the latter should take his own life.

The contract of insurance is based upon the idea that a man, knowing the uncertainty of life, desires to secure a provision payable upon the occurrence of this uncertain event. This idea includes no thought of a provision in case of a deliberate, intelligent ending, by the insured, of his own life. It is not based upon what the party to be benefited can make certain at his will.

The reasons which may move a sane man to kill himself are unknown. It is impossible to formulate any tables which will cover the risk that he will do so. There may be a certain percentage of mental diseases which, in a certain percentage of cases, may end in suicide; or there may be a certain percentage of deaths resulting from diseases generally. There can be no estimate of the chance that a man will benefit those near to him by taking his own life.

Whilst the contract is to pay a certain sum in case of death, it is implied that the death shall be one not brought about by the insured. It is impossible to believe that a contract of insurance would result in case of a request by a would-be insurer for the issuance of a policy to cover his suicide whilst sane.

We will not be helped by a reference to the fact that in insurance policies, where there is an exception in case of self destruction, it is usual to add the words "sane or insane." The desire of the insurer is to exempt himself from responsibility

in case of a death "sane." He knows, however, that the probability will be that such exemption will avail him nothing, thus expressed, through the unwillingness of the jury to find insanity. To reasonably protect himself against liability in case of a suicide by an insane man, he must add a provision covering insanity.

In Mr. Biddle's note 5 to his Work on Insurance, section 4, he speaks of the contract of insurance as one in which the insurer "engages that the person shall not die within the time "limited in the policy, or, if he do, that he will pay a sum of "money to him in whose favor the policy was granted." The quotation is taken from Baron Parke.

Would it not be anomalous to hold that the engagement to pay a person a sum of money if he should die, is meant to be kept in case such person shall bring about his own death? Mr. Biddle further quotes from Parke to the effect that the contract of insurance is for the payment of a certain annuity, "the "amount of the annuity being calculated in the first instance "according to the probable duration of the life." Can any calculation be made upon the probable duration of the life of a man who is to be paid the contract money as soon as he dies?

2. A contract providing a recovery in case of suicide by the insured, albeit sane, would be against the policy of the law.

No contract ought to be sustained providing for the payment of money in case of a commission of a crime, or of deliberately taking life. Suicide is a crime.

It would not be contended, if the policy were to provide that in case of the insured's deliberate self killing, when sane, the insurer would pay a certain sum to his personal representatives, that there could be a recovery.

The appellant argues (page 26):—

If public policy does not forbid the payment of the policy when, by the terms of the policy, payment is made directly by the insurance company to the creditor or relative, public policy cannot forbid when the payment is made in effect for the benefit of creditors and relatives, to be distributed among them by an executor or administrator.

The public policy which is involved is, that no covenantee may provide by any contract, for a profit to himself by a criminal, or illegal, act by him done. In case of an assignment, and of a holding of a policy for value, by some third person, the party who does the wrong is not the one benefited. There is nothing illegal in a creditor taking out a policy either directly, or by way of assignment, insuring himself against the consequences of the death of a third person, however occasioned, whether by his own act or otherwise. The decided cases have, in some instances, saved the rights of innocent third persons, but especially those of holders for value. The reason for sustaining a policy, in such a case, does not exist where the policy is held by the insured himself.

It is argued by the appellant that the insured receives nothing because the contract does not mature until after his death. It might as well be said that a loan returnable to the lender, with interest, upon his decease, cannot benefit him. The distinction between a contract performable in favor of a third person, and one performable in favor of the person himself, is a very obvious one.

Men spend their lives in the accumulation of money, with a knowledge that the time will come when they must die, and when others—their relatives and family—alone can profit. One of the strongest motives for the accumulation of money is a benefit which can only be realized by others. Though the fund be not payable until decease, it is one belonging, and subject, to the testamentary power of the insured.

The man who, being insured against fire, would destroy himself and his property, by fire, at the same time, would lay no foundation for a recovery of the fire insurance money, because his estate alone could reap the result.

The appellant says (page 29):—

> While a policy drawn in express terms to insure only against the case of a suicide might be objectionable to public policy, the cases cited show that where the contract of insurance is entered into in good faith to cover the contingencies of life and death, the fact that he whose life is insured dies by his own hand does not, upon any ground of public policy, stand in the way of the payment of the policy.

What distinction exists between a policy drawn in express terms to insure only in case of a suicide, and one which expressly insures against death from other causes, and impliedly against death from suicide? So far as the contract covers the illegal provision, it must fall. Contracts implied, equally with those expressed, to do a thing contrary to public policy, are illegal. The suggestion of the appellant is thus met by the Lord Chancellor in the Fauntleroy case, 2 Dow & Clark, 20:—

> Suppose that in the policy this risk had been insured in terms—that in the event of the party effecting the insurance being executed for a capital felony the money should become payable—is it possible that a claim in right of a party effecting such an insurance could be maintained, or that the insurance should not be held void as affording encouragement to crime, and being contrary to public policy? If such a policy could not be sustained where a risk of that kind was mentioned in direct terms and language, how can you give effect to a policy if it in reality involves that condition?
>
> On this short and plain ground we are of opinion that the claim cannot be sustained, and that the judgment of the court below must be reversed.

It may be argued that a person will not be likely to kill himself for the purpose of securing a distribution to creditors, and to his family, of insurance money, and that, therefore, the payment of a designated sum, in case of such killing, will be harmless. In the present case, however, we find that a man of sound mind DID kill himself for the very purpose of securing to his creditors, and to his family, the insurance moneys now sought to be recovered. Runk's letters show that the purpose of his suicide was to bring about a recovery of the insurance moneys. Can we say, then, that it is not contrary to public policy to make a contract which, expressly or impliedly, may condone an act criminal, and contrary to public morals and policy?

In the Fauntleroy case, from which we have just quoted, it was held that a policy could not be recovered under the following circumstances:—

> Fauntleroy effected the policy in January, 1815, and paid the premiums on it up to 1824. On the 29th October, 1824, a commission of bankruptcy was issued against Fauntleroy, who was duly declared bankrupt, and his estate and effects vested in the respondents, as his assignees under the commission. On the 28th October, 1824, Fauntleroy was indicted for

felony, and on the 30th of that month he was tried and convicted, and received sentence of death, and was afterwards executed; and the question is whether, under these circumstances, the assignees can recover from the insurance society the amount of the sum insured on Fauntleroy's life; that is, whether—the party effecting the insurance having committed felony, and having been tried, convicted and executed for felony—the parties representing him, and claiming under him and in his right, can maintain the suit. I listened with the utmost attention to the arguments at the bar, as did the noble lord (Radnor) who is now present, and was present at the hearing of the cause, and we have come to the conclusion that the assignees are not entitled to maintain the suit.

If it be said that a contract on the part of the insurer to pay a sum of money in case of a deliberate, intelligent killing, would only be illegal because it would disclose a mutual intent on the part of the insurer as well as of the insured, may we not reply that if there be no *mutual* intent, there can be no duty to pay on the part of the insurer?

3. A suicide by the insured, whilst sane, with the intent to compel payment of insurance money to his estate, is a fraud upon the insurer.

Is it consistent with common sense, to hold, where the insured enters into a contract with the insurer, requiring the latter to pay a certain sum upon his decease, that he can bring about the duty of payment by any act of his own, deliberately and intelligently done, for the benefit of his estate?

The learned judge put, as analogous, the case of destruction, by one insured against fire, of his own premises; and that of murder of the insured, by the assignee of a policy. Are they not analogous? The appellant says not; but has he sustained his assertion by argument? The fire insurance policy stipulates that in case of a destruction by fire, a certain sum shall be paid. It expresses no condition that the destruction shall not be occasioned by the insured. The inability to recover results only from what is implied, viz., that the insured will not commit a fraud upon the insurer. The contract of life insurance, requiring the payment of a designated sum upon the contingency of death, contemplates a death uncertain as to

time, not one which can be made certain by the act of the person to be benefited. The condition of non-destruction by the insured is implied, just as much as in the case of fire insurance. There is no implied condition that there shall be no payment if suicide be occasioned by insanity, because insanity is a disease, and against the chance of disease the policy is issued.

Why may not the assignee of the policy who murders the insured recover? Not by way of punishment of his crime, because the law fixes a punishment which does not entail a forfeiture of property; but only because the receipt of payment results from a fraud.

The appellant concedes that if the insured takes out a policy with the intent to commit suicide, and subsequently does deliberately commit suicide whilst sane, there can be no recovery. He makes the admission because the decisions to that effect are incontrovertible. If, however, it be lawful to make a contract looking to the payment of the personal representatives of the insured in case of deliberate, intelligent, suicide, why is it a fraud to make it when the insured entertains the intent to kill himself? The insurer, if a man has a right to stipulate for payment to his estate upon a certain condition, cannot justly complain that he intends the condition shall occur. If it be a fraud upon the insurer to bring about the happening of the condition, it is also a fraud to enter into a contract with the intent to bring it about; but if, however, the insured does not impliedly agree that he will not deliberately, intelligently, kill himself, he can hardly be held to perpetrate a fraud by entering into a contract intending to do what is within his right.

Having thus defined the three reasons which, in our opinion, sustain our proposition that there can be no recovery upon a policy by the personal representatives of one who, being insured, killed himself deliberately, whilst sane, we will make certain general remarks upon the subject.

Though this contract seemed, upon its face, to be a New York contract, being executed and delivered in that State, and being made performable, both as to payment of premiums and

insurance money, in that State, and though there could have been no recovery, unless it had been held to be a Pennsylvania contract, it is now sought, by the appellant, to escape from the law of Pennsylvania upon the subject.

In Hartman *vs.* Keystone Insurance Company, 21 Penna., 466, 479, it was said :--

> Besides this, the court was very plainly right in charging that if no such condition had been inserted in the policy, a man who commits suicide is guilty of such a fraud upon the insurers of his life that his representatives cannot recover for that reason alone.

It is true that in American Life Ins. Co. *vs.* Isett, 74 Penna., 176, it was said that this case "does not profess to hold that "self destruction by the insured, in all cases, avoids the policy." Though in the Hartman case, the remark was general, that the man who committed suicide was guilty of a fraud such as prevented a recovery by his personal representatives, it was meant to apply merely to the case of one who could commit a fraud, *i. e.*, one who deliberately and intelligently committed suicide, not one who was forced to the act by overpowering mental disease.

The late Judge Trunkey in the Bank of Oil City case, 6 Legal Gazette, 348, said :—

> One guilty of suicide who has his life insured, commits a fraud upon the company, and there can be no recovery upon the policy whether there be such a condition expressed therein or not.

Again, he was referring to a case of deliberate, intelligent suicide.

Whilst there is no decided case applying the proposition for which we contend, there are numerous statements of the law by English judges, of the highest character, and there is no statement to the contrary in any decided case, or in any text book writer of any authority. There is a statement which the appellant quotes from a man named Bacon, who speaks of a weight of authority, but utterly fails to cite a single case in support of his proposition.

The English judges have thus spoken.

We have already quoted from the well-known Fauntleroy case.

In Bolland *vs.* Disney, 3 Russell, 351, it is said:—

To avoid the obligation to pay, the act of the party insured, which produces the event, must be done fraudulently for the very purpose of producing the event.

In 30 Law Journal, 511, Vice-Chancellor Wood, referring to the Fauntleroy case, said:—

So the argument might be pursued—although I do not know that any case has so decided—to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing the felony and losing his life thereby; but I know of no rule of law that could justify me in extending that to a case of a person committing suicide while in a state of insanity, and therefore committing no legal offense.

In Moore *vs.* Woolsey, 4 Ellis & B., 243, Lord Campbell said:—

If a man insures his life for a year and commits suicide within a year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover upon the policy if within the year he causes her to be sunk. A stipulation that, in either case, upon such an event, the policy should give a right of action would be void. But where a man insures his own life we can discover no illegality in a stipulation that if the policy should afterwards be assigned *bona fide* for a valuable consideration, or a lien should afterwards be acquired *bona fide* for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned. No authority has been cited in support of the position that such a condition is illegal, and the frequent introduction of it into life policies indicates the general opinion that it is unobjectionable. The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil by leading to suicide is a very remote and improbable contingency, and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee. On the demurrer to the second replication, therefore, we think there ought to be judgment for the plaintiffs.

In Jackson *vs.* Foster, 5 Jurist, 547, in the Exchequer Chamber, Chief Justice Cockburn said:—

The insurance company may be taken to have granted the insurance upon a calculation of the average duration of human life; and for that

reason to have excluded from the benefit of the policy the case of death by suicide. But for this exclusion a man might insure his life with an intention of putting as end to it by his own hands. But on the other hand, it would be injurious to the interests of insurance companies if policies could be avoided whenever the assured committed suicide, even when the interest in the policy had passed to a third party, inasmuch as one of the chief advantages of a life policy, the power of making use of it as a negotiable instrument, would be destroyed.

These decisions of the English judges are quoted approvingly not only in Pennsylvania, but also in 71 Alabama, 436, where it was said:—

The certificate is silent as to the consequence, if the member whose life was assured should die by his own hands; and the by-laws of the association, or order, when the certificate was issued, contained no provision declaring in that event an avoidance or forfeiture of the certificate. We are not aware that it has been expressly decided that voluntary self destruction by one whose life was insured and of whose sanity there was no question, would avoid the contract of insurance; or rather, would not fall within its risk, though in that event there was not expressed an exception to the liability of the insurer. The authorities generally seem to proceed upon the tacit or expressed concession or admission that such is the law. In Moore *vs.* Woolsey, 4 Ell. & Black, 243, Lord Campbell said: "If a man insures his life for a year, and "commits suicide within the year, his executors cannot recover upon "the policy; as the owner of a ship who insures her for a year cannot "recover upon the policy if within the year he causes her to be sunk; "a stipulation that, in either case, upon such an event, the policy should "give a right of action, would be void," In Amicable Ins. Society *vs.* Bolland, 2 Dow & Clark, 1 (known as Fauntleroy's case), it was held by the House of Lords, that though there was not in the policy an exception of the liability of the insurer in the event the assured came to his death by the hands of public justice, the exception would be implied for the reason that an express contract for liability in that event would contravene good morals and sound policy. The inference or implication of the law was, therefore, that the execution of the assured by the hands of public justice, for the commission of crime, is not within the risk of the policy. A construction, or an implication, which will preserve the legality of the contract is preferred to one which will have the opposite effect. Referring to Fauntleroy's case, it was said by Wood, V. C., in Horn *vs.* Anglo-Australian and Universal Fam. Life Ins. Co., 7 Jurist, N. S., 673: "The argument might be best, "although I do not know that any case has so decided, to the same ex-"tent in the case of a person committing suicide while in a sane state "of mind, thus committing a felony, and losing his life thereby." In Hartman *vs.* Keystone Ins. Co., 21 Penn. St., 466, Black, C. J., said that

though the policy was silent in reference to self destruction, if the accused committed suicide he was "guilty of such a fraud upon the in-"surer of his life, that his representatives cannot recover for this reason "alone." Hunt, J., however, said of this case, in Life Ins. Co. *vs.* Terry, 15 Wall., 586, that it was in this respect "confessedly unsound." The case in its entirety is not supported by the current of authority. It rules that an exception in the policy, expressed in the words, "should "die by his own hand," must be severed and dissociated from other exceptions expressed in words involving the self criminality of the assured; were to be construed by themselves, and imported "any sort of "suicide," leaving it in doubt whether "suicide" expressed intentional, voluntary or involuntary, accidental self destruction.

A contract of life insurance is similar in form, in the relative rights and duties of the insurer and the assured, and differs in many respects from marine or from fire insurance; yet, the general principles applicable to marine or fire insurance are applied, so far as consistent with the nature and obligations of the contract, to the contract of life insurance. In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property or health or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud, or the criminal misconduct of the assured is, in contracts of marine or of fire insurance, an implied exception to the liability of the insurer. Waters *vs.* Merchants' Louisville Ins. Co., 11 Peters, 213; Citizens' Ins. Co. *vs.* Marsh, 41 Penn. St., 386; Chandler *vs.* Worcester Mut. Fire Ins. Co., 3 Cushing, 328. Death, the risk of life insurance, the event upon which insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk and hasten the day of payment of the insurance money.

The doctrine asserted in Fauntleroy's case, that death by the hands of public justice, the punishment for the commission of a crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, however, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the inception into policies. The same considerations in reasoning which support the doctrines, seem to lead, of necessity, to the conclusion that voluntary criminal self destruction, *suicide*, as defined at common law, should be implied as an exception to the liability of the insurer, or, rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction or implication exceptions into such contracts, which usually contain special exceptions. An express contract to pay insurance money to the insured, in the event he

committed suicide, an increased premium being paid because of the risk, there could be but little, if any, hesitancy in repudiating as offensive to law and good morals. The fair and just interpretation of a contract of life insurance made with the assured is, that the risk is of death proceeding from other causes than the voluntary act of the assured, producing, or intended to produce it; and especially of a contract made by an association or organization, with one of its members, the objects and purposes of which is that the members will contribute to and bear each other's losses, or the losses of those dependent upon them. The extinction of life by disease, or by accident, not suicide, voluntary and intentional by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime. Bliss on Life Ins. Section 242-3.

In Armstrong *vs.* Mutual Life Ins. Co., 117 U. S., 591, Mr. Justice Field said:—

It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired.

May we not say that it would be equally a reproach to the jurisprudence, if a contract could be made, and could be recovered upon, providing that in case of deliberate, intelligent self killing, the estate of the insured should derive any benefit therefrom?

In the last book upon Insurance, Mr. Biddle, section 830, says:—

It may be that a contract of insurance would be avoided where the insured commits intentional self destruction or suicide, and while it will be difficult to find any case deciding that it does, there are undoubtedly dicta to that effect.

The appellant urges that there is a dictum of Mr. Justice Hunt which should govern this case, to be found in Life Ins. Co. *vs.* Terry, 15 Wallace, 580. It is in these words:—

In Hartman *vs.* Keystone Insurance Company the doctrine of Borradaile *vs.* Hunter was adopted, with the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy.

In that case the Supreme Court of the United States found it necessary to decide a point concerning which there had been a great conflict of authority, the English cases, beginning with

Borradaile *vs.* Hunter, having decided in a way which it found itself unable to follow. In England it had been held that under a policy providing that there could be no recovery in case of self destruction, there was no liability in case of destruction by a man who deliberately killed himself with the intent to kill, even though he might not be of sound mind. It became necessary to review the authorities, and, in the course of a long list of citations, the case of Hartman *vs.* Insurance Company was mentioned. The question to be decided by the judge who wrote the opinion was whether, if the policy provided against liability in case of suicide, a killing by a man of unsound mind was contemplated. It was in this connection he said of the Hartman case that it adopted the Borradaile case, which had held the insurance company exempt in case of a clause in the policy whether the man was sound or unsound, with the confessedly "unsound addition" that the suicide would avoid the policy even though there was no condition to that effect. He was not considering the case of suicide by a man of sound, but that of suicide by a man of unsound mind, and in connection only with this, did he deal with the Hartman case. He thought it unsound if it held that in such a case there could be a recovery, though there was no clause saving suicide in the policy itself. The question of liability to the personal representatives of a man of sound mind, in case of suicide, was not considered by the court in that case, or in any way contemplated by the learned judge who delivered the opinion.

We have said all that is necessary to be said concerning the Bacon citation—a book with which we are entirely unfamiliar. The author deserves no credit saving to the extent that he can support his proposition by decided cases. He cites none.

The references by the appellant to authorities in which it has been held that there may be a recovery upon a policy in case of a deliberate killing by a man of sound mind, are to those in which the recovery was allowed in favor of assignees. In no case was such a recovery permitted by personal representatives. The decisions were expressly rested by the learned judges who decided them, upon the fact that the recovery was for the benefit of third persons.

In Fitch *vs.* Life Ins. Co., 59 N. Y., 573, it was expressly said :—

> It was not taken out for the benefit of Fitch (the insured), but of his wife and children.

The suit was not by the personal representatives. There is a difference in the contemplation of law between the case of a recovery upon a policy controlled and owned by a man at the time of his death, and one over which he had no control. With motives which lead to benefit to others, the courts may not deal. With those which lead directly to the benefit of the party, or of his estate, they may, and do.

The citations of authorities by the appellant, taken without their context, are misleading. An examination of them shows them to be utterly valueless in support of anything urged by him.

III. APPELLANT'S THIRD POINT, VIZ., THAT THE LEARNED TRIAL JUDGE ERRED IN CHARGING WHAT CONSTITUTES INSANITY.

The bold assertion is made by the appellant that the charge of the learned judge, in which he defines mental unsoundness, was not in accordance with the decisions by the Supreme Court of the United States. He quotes the charge and at great length quotes the decisions, doing nothing more saving assert that there is a difference. We have read not only the citations, but the authorities themselves in the original, and we fail to see the difference claimed to exist.

We read in the decisions nothing of that which is so much dwelt upon by the appellant, *i. e.*, "the impulse of self de-"struction" * * * "The impairment of the moral vis-"ion." Something is said about an irresponsible *insane* impulse but this renders it still necessary to define insanity. We concede that if the impulse is an insane one there can be a recovery. We deny, however, that an impulse which is not insane, or which is irresistible through viciousness, is sufficient to justify a recovery.

The appellant says (page 46) :—

> In all these cases the impairment of the moral vision, so as to leave the deceased in a condition that he was unable to resist the impulse of

self destruction, is accepted as an insanity or mental unsoundness sufficient to relieve him from the charge of felonious suicide. The charge of Judge Butler enforces a much stricter rule, and mental perception of consequences and mental consciousness of wrongfulness, irrespective of moral power to resist, according to the charge, was sufficient to place the deceased in the category of a felonious suicide.

A search through all the cases decided by the Supreme Court of the United States will fail to disclose any announcement that an "impairment of the moral vision," so as to leave the deceased in a condition unable to resist the impulse of self destruction, is insanity. Such an examination will fail to disclose any other standard of insanity than an impairment of mental perceptions and mental consciousness.

Other courts had held a man to be mentally sound, within the meaning of a life insurance policy, if he had deliberately killed himself, or had done that which he knew would kill him, with the intent to bring about that result. It was held by our highest tribunal that a man was insane, and was mentally unsound, if he knew what he was doing, and meant to do it, but was mentally unable to discriminate between right and wrong in his perception of the consequences of the act.

We concede that a man is not of sound mind who is not "able to understand the moral character and consequences of "his act." So the learned judge charged.

Let us consider the cases so confidently appealed to by the appellant. Mr. Justice Miller, in the Terry case (15 Wallace, 580), said:—

> The act of self destruction must have been the consequence of insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. * * * If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable.

In affirming this charge, Mr. Justice Hunt said:—

> The request for instructions made by the counsel of the insurance company proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be

the result, he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity does not affect the case. The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that although the deceased had the capacity to know that he was about to take poison, and that his death would be the result, yet, if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable. * * * The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis—the moral and intellectual incapacity of the deceased. In each case the physical act of self destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis--that the act was not the voluntary, intelligent act of the deceased.

He further said:—

When we speak of the "mental" condition of a person we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect his will, his memory, his understanding are perfect, and connecting with a healthy bodily organization. If these do not concur his mental condition is diseased or defective.

He concluded:—

If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

In the Rodel case, 95 U. S., 232, Mr. Justice Bradley said:—

The judge properly refused the request to charge that the plaintiff could not recover if the insured knew that the act which he committed would result in death, and deliberately did it for that purpose. Such

knowledge and deliberation are entirely consistent with his being, in the language of the charge, "impelled by an insane impulse which the "reason that was left him did not enable him to resist," and are, therefore, not conclusive as to his responsibility or power to control his actions.

In the Broughton case, 109 U. S., 121, Mr. Justice Gray said:—

The remaining and the most important question in the case is whether a self killing by an insane person, having sufficient mental capacity to understand the deadly nature and consequences of his act, but not its moral aspect and character, is a death by suicide within the meaning of the policy. * * * If he was impelled to the act by insanity which impaired his sense of moral responsibility, the company was liable.

In the Akens case, 150 U. S., 468, counsel presented the oft-discredited point, running thus:—

If the jury believe from the evidence that the self destruction of the said Smith was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then and in that case it is wholly immaterial in the present case that he was impelled thereto by insanity which impaired his sense of moral responsibility and rendered him to a certain extent irresponsible for his action.

The learned trial judge there held:—

If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to commit, the defendant is liable.

Mr. Justice Gray again repeated:—

If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence and effect, it is not a "suicide."

It will be observed that in all these cases it is required, to constitute mental unsoundness, that the *reasoning* faculties must be impaired by insanity so that the suicide cannot understand the moral character of his act; that he must be urged by an *insane* impulse; that he must be impelled to the act *by insanity*, impairing his moral sensibility; and that his *reason-*

ing faculties must be so impaired that he is not able to understand the moral character, &c., of his acts.

Let us see what the learned trial judge said (Record, 146):—

> If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence and effect, such self destruction will not of itself prevent recovery upon the policies. * * * We must understand what is meant and intended by the term "moral character of his "act." It is a term which has been used by the courts and is correctly inserted in the point; but it is a term which might be misunderstood. We are not to enter the domain of metaphysics in determining what constitutes insanity, so far as the subject is involved in this case. If Mr. Runk understood what he was doing, and the consequences of his act or acts to himself as well as to others; in other words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would, then he is to be regarded by you as sane. Otherwise he is not.

He added:—

> I therefore charge you that if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of his act, his suicide is a defense to this suit.

We deem it necessary to do no more than to put this charge in juxtaposition with the law as laid down by the Supreme Court.

CHARLES P. SHERMAN,
JOHN G. JOHNSON,
For Appellee.

APPENDIX.

A. Howard Ritter, Executor of the estate of William M. Runk, deceased,

vs.

The Mutual Life Insurance Company of New York.

A. Howard Ritter, Executor of the estate of William M. Runk, deceased,

vs.

The Home Life Insurance Company.

Deposition taken without rule, by agreement, upon mutual understanding as to time, of Mrs. Mary A. Barcroft. Deposition taken because of a physician's certificate that Mrs. Barcroft would not be able to be in attendance at court.

Present—Mr. George Tucker Bispham, for plaintiff; John G. Johnson, Esq., for Mutual Life Insurance Company; and John Scott, Jr., and John G. Johnson, Esqs., for Home Life Insurance Company.

Mrs. Mary A. Barcroft, being duly sworn, deposed as follows:—

By Mr. Johnson:

Q. At the time of William M. Runk's death, was he indebted to you, and if so, in what amount?

A. Yes, sir; I held his note for $127,550.

Q. Do you remember the date of that note?

A. November 10th, 1890.

Q. That was his total indebtedness to you, was it, at the time of his death?

A. Yes, sir.

Q. Had he had any charge or custody of your financial matters in any way?

A. No, sir.

Q. What collateral did you have for that note?

A. Life insurance policies.

Q. Can you tell in what companies?

A. Policy No. 36,437 in Penn Mutual Life Ins. for $5,000
" " 36,438 " " " " .... " 5,000
" " 42,802 " " " " .... " 20,000
" " 110,445 " North Western Mut. .. " 10,000
" " 12,796 " State Mutual Life Assur. " 10,000
" " 172,721 " Northwestern Mut. Ins. " 35,000
" " 228,556 " New York Life Ins. Co. " 25,000
" " 228,557 " " " " " " " 25,000

Q. And these policies you retained, without any change, until his death?

A. Yes, sir.

Q. And upon his death, you collected some of them?

A. Yes, sir; all of them.

Q. Do you remember the total collected?

A. There was some interest due, and there were some bonds that had to be redeemed, and I just made use of all of them to pay these off, and, I think—I am quite sure, that it took the whole amount.

Q. How much did you realize from the policies?

A. $135,000; it may have been a little over.

Q. Then there was enough realized from the policies to pay the note?

A. Yes, sir.

Q. That note was one that he gave for a loan that was regularly made and continued from time to time?

A. Yes, sir.

Q. Did you renew the note, or was it the same note?

A. It was the same note.

Q. Didn't you, from time to time, advance him some other moneys?

A. Never without his asking for it.

Q. Tell us what those amounts were.

A. I couldn't tell you. My books will show every dollar, but I cannot tell now.

Q. Have you them here?

A. Mr. Tener has them at the Mortgage Trust Company. They will give you every dollar, dates and everything. They were kept very correctly.

Q. Have you any idea of the aggregate, at the time of his death, of the other advances?

A. I cannot answer that.

Q. Was it as much as $100,000?

A. I think it might have been.

Q. You spoke, Mrs. Barcroft, of using that $135,000, or some of it, in taking up some bonds. What bonds were they?

A. Norfolk and Western Railroad Company, Baltimore and Ohio Railroad Company—there were three sets of bonds. I forget the other.

Q. With whom were those bonds?

A. He took them from me, and I don't know where they were.

Q. How did he take them?

A. He asked me for the loan of them.

Q. Do you remember when?

A. I think the Norfolk and Western was just about a year before his death, and the others were some time previous to that—a year or two. At the time of this note being drawn up there was, I think, a list that he had as to the Norfolk and Western bonds. The books will tell.

Q. At the time these advances were made to him did you take any obligation from him?

A. No, sir.

Q. How was it that you took the obligation for the $127,550 and did not for these?

A. I wanted a settlement with him for what he owed me—some arrangement made whereby he would be protected in his business and I would be protected, and I thought it was proper and right to do so. I came to see Mr. Bullitt, and he made all the arrangements. I wanted him to be protected in his business, and I might die, and I wanted my estate protected.

Q. But you have not told us how the indebtedness—how did he become indebted in this way? Did he, in the first instance, borrow these bonds from you?

A. Yes, sir.

Q. When he borrowed them from you, what did you take from him to show that he owed them?

A. Nothing. I signed a paper giving him the power to use them. I remember that.

Q. Was that a written paper?

A. It must have been; yes, sir; I never had it.

Q. And were all of these bonds advanced to him on that paper?

A. Not on that one paper, but at different times, and on different papers.

Q. What became of the papers?

A. I cannot tell you. I never had them.

Q. Have you any idea what those bonds were pledged for, that you took up after his death?

A. I cannot tell you that, sir. I think Mr. Tener can tell you.

Q. How did you ascertain where those bonds were?

A. I can't tell you that.

Q. Who did ascertain it?

A. Mr. Tener.

Q. Weren't they in the hands of brokers?

A. I think so, sir.

Q. Had you loaned them to him for the purpose of pledging them with brokers?

A. No, sir.

Q. You were entirely ignorant of that use of them?

A. Yes, sir.

Q. You loaned him money to put in his business?

A. Yes, sir.

Q. And supposed that it was in his business?

A. Yes, sir.

Q. When did you find the contrary?

A. Not until after his death.

Q. Did you know, at any time, that he was speculating in stocks?

A. No, sir.

Q. You saw him pretty frequently up to the time of his death?

A. Almost daily. I could not tell how often, but two or three times a week.

Q. And that fact he never disclosed to you up to the last moment?

A. No, sir.

Q. Nor gave you any idea, of any sort or kind, that he had been doing it?

A. No, sir; and I had not the slightest suspicion of it.

Q. Do you remember many years ago he became involved in some difficulty owing to speculation in Jersey Central, where you helped him out?

A. I know nothing about it.

(Mr. Bispham objects to this and to the manner of question generally, with a reservation of the right to object to the disability of the witness, saving that such objection shall not be to the mere shape of the question.)

Q. Do you remember paying any money on William M. Runk's account after his death, to the Episcopal City Mission?

A. Yes, sir.

Q. How much was that?

A. $40,000.

Q. That was the amount which, as treasurer, he had embezzled, was it not?

A. I don't know how he got it.

Q. He had been the treasurer?

A. Yes, sir; and the report was that he had used that money.

Q. I take it for granted your intervention was simply to save his credit?

A. Yes, sir; himself and his family.

Q. Were there any other settlements which you made after his death to order to preserve his credit?

A. No, sir. Mr. Darlington and I agreed to indemnify the executor against loss if he would pay the small bills and the estate should prove insolvent.

Q. It was found, in this Episcopal City Mission, that he, as treasurer, had appropriated a certain amount of cash, and used certain of their bonds, and you then agreed that you would

pay them the amount that was due, and should take an assignment of their claim against the estate?

A. Yes, sir; that is correct.

Q. You presented at the audit a claim of $86,736 against the estate in the Orphans' Court. Do you remember that?

A. I saw that in the paper, but I don't know how it came about. It was so printed in the paper. I had not done anything like that. I went to Mr. Tener and he explained about it. I had only $40,000; not the whole amount.

Q. Do you remember what his explanation was, now?

A. They made it so as to cover up the City Mission. It was fixed with the court, or something of that kind, that it should not be that he owed the City Mission, that I had assumed it.

Examination of MR. TENER, with the books:—

Q. Mr. Tener, tell us, please, how much Mrs. Barcroft got from the policies of insurance; how much she loaned Mr. Runk; the amount of bonds of hers he had pledged with the brokers and the dates at which she had loaned him these bonds.

(Mrs. Barcroft's books, as kept by Mr. Tener, are now produced at the suggestion of counsel, and she is allowed to refresh her memory and inform herself as to details therefrom, with his assistance.)

A. The books show that the amount received from insurance was exactly $135,000. October 11th, 1892, New York Life Insurance Company, $50,000; October 12th, 1892, from the Penn Mutual Life Insurance Company, $29,290.71. In explanation of the odd amount, there was some reduction, I think, of a premium note against it. November 8th, from the Northwestern Life Insurance Company, $45,109.80; November 11th, from the State Mutual Life Insurance Company, $10,000; amounting in round figures to $135,000.

Q. Now, I wanted to see how much of that money was paid, and when and to whom in taking up her bonds, which had been pledged with brokers.

A. On November 11th, Mrs. Barcroft paid the Beneficial Saving Fund Society $10,167.50 to redeem $10,000 bonds of

the Baltimore and Ohio, which I understand she had loaned Mr. Runk.

Q. They were pledged with the Beneficial Saving Fund Society on Mr. Runk's note, of course?

A. Yes, sir; as collateral security.

By MR. BISPHAM:

Q. Do your books show the date when the bonds were pledged?

A. No, sir.

By MR. JOHNSON:

Q. It will show the date of Runk's note?

A. No, sir.

Q. Do the books show what the amount of Runk's note was?

A. No, sir; we just simply relieved the bonds for the amount that they had charged against them. In other words, we paid off the loan. On the same day, November 11th, 1892, paid the Philadelphia Saving Fund Society $17,353 for the purpose of redeeming $12,000 bonds of the Norfolk and Western, and $5000 bonds of the Camden and Atlantic Railroad Company, and $1000 City of Cincinnati, in all, $17,353.. November 17th, paid to R. E. Tucker & Co., brokers, $2,057.08 in redemption of $2000 of bonds of the Camden and Atlantic Railroad Company and $1000 Lehigh Valley Railroad Company. That seems to be about all.

Q. That would expend only about $29,410. The balance of the $135,000 must have been put into something.

A. When Mr. Runk went into business with Mr. Darlington, in 1878, Mrs. Barcroft loaned him $69,000 in money to make up his $100,000 share of the capital of that concern, and subsequently from time to time she loaned him from $28,000 to $30,000 additional, as he needed money. The $28,000 to $30,000 was not loaned at one time. There were loans from time to time upon which payments were made.

Q. Were these loans of $69,000 and $28,000 to $30,000 additional to the note of $127,550?

A. Which note do you refer to, Mr. Johnson?

Q. The note that Mrs. Barcroft took in 1890.

A. The note for $127,550 was taken in 1890, in settlement of all the advances up to that time.

Q. But what I wanted to see by the books was whether there was not paid out of this $135,000 that was got after Runk's death a larger amount than the $10,000, $17,000 and odd and $2,000 and odd in taking up the bonds of Mrs. Barcroft's.

A. There was a balance of interest against him in this account of a little over $4000.

Q. He was that much back in his interest at the time of his death?

A. Yes, sir; that was only six months' interest on the whole indebtedness.

Q. I do not, of course, mean what Mrs. Barcroft took, which of course she had a right to in payment of the debt, but whether she did not use more than these three sums of that $135,000 in redeeming bonds of hers which Runk had pledged?

A. Not one dollar, and I may add in addition to that that there was a balance of $350.13 due her after all the insurance was paid.

By Mr. Bispham:

Q. That represented the total indebtedness of Mr. Runk to Mrs. Barcroft?

A. Yes, sir.

Q. That is, the $135,000 collected on the insurance policies, plus this balance of $350, represented the total of Mr. Runk's indebtedness to Mrs. Barcroft at that time?

A. Yes, sir.

By Mr. Johnson:

Q. Then how was this $86,736 made up, Mr. Tener?

A. On February 3d, 1893, Mrs. Barcroft issued her check for $35,000 to be paid to the Protestant Episcopal City Mission, and she took an assignment of the claim of the City Mission against the estate. On March 17th there was a further sum of $5000 paid in the same way, and again, the same day, $140.36. On December 27th, 1893, a still further sum of $859.62 was paid through Mrs. Barcroft's counsel to the City Mission. This makes a total of $40,999.98.

Q. She spent $40,000 out of her own account?

A. Yes, sir; they were her own. They had nothing to do with the City Mission.

Q. Her claim of $86,000 was composed partly of that?

A. The insurance paid for this. That is, her entire claim was made up a little short of $100,000 in money actually paid, and in money afterwards advanced to redeem the bonds and the interest. This first matter that we were speaking of had no connection with the City Mission.

Q. Didn't he owe the whole of that note, $127,550, at the time of his death?

A. Yes, sir; the $30,000 which Mrs. Barcroft loaned were part and parcel of that $127,000.

Q. These bonds, then, which were taken up at the Philadelphia Saving Fund, and the Beneficial Saving Fund and Tucker & Co.—these bonds thus taken up made up part of the $127,550?

A. Yes, sir.

Q. Well, then, there was upwards of $45,000 that was not included?

A. I have no knowledge whatever of the claim that was sent to the executor of the estate. I don't know how that was made up.

Q. Can you tell by the books when these bonds were loaned to Runk?

A. When they were loaned there was no entry made, but Mr. Runk afterwards gave Mrs. Barcroft a due bill, which is in her possession. That is in the Fidelity Company. It was six or seven years ago—six years at least.

Q. Who will know about that?

A. Mr. Ritter is very familiar with all the details of this claim.

Q. Mrs. Barcroft, after hearing what your books contain, and having your memory refreshed as far as these books will refresh it, you cannot give us any further explanation of how the claim of $86,000 was made up?

A. It was made up by the City Mission, and with life insurances paid in to the executor he was able to pay off that much,

$40,000 and odd. And then he came short—he expected to settle the whole amount.

By Mr. Tener:

As I understand, the $40,000 paid by Mrs. Barcroft to the City Mission testified to, was in addition to an amount of some $45,000 paid by the executor on account of the total claim, and Mrs. Barcroft, in order that there might be no claim against the executor for having thus paid it, assumed the entire amount.

Q. Of course, Mrs. Barcroft, during the lifetime of Mr. Runk you were in total ignorance of that shortage?

A. Entirely so. I knew he was the treasurer, but as for his using any of the money, I didn't know anything about it.

Q. Did you receive a letter shortly before the death of Mr. Runk, or immediately after, written by him?

A. Yes, sir.

Q. Have you that letter?

A. Yes, sir.

Q. Will you let me see it?

(Letter produced and read by Mr. Johnson.

Envelope addressed, "Mrs. M. A. Barcroft.")

"St. Davids, Pa.
"Llandeilo.

"My Dear Aunt Mary:—Forgive me for the disgrace I bring upon you, but it is the only way I can pay my indebtedness to you. A. Howard Ritter will attend to all my affairs with Evelyn. You have always told me my mind was not strong. I have been led astray, have been infatuated with speculation and lost. I worked too hard,—I am wild but cannot recover now.

"Thank you for all you have been to me in every way. Forgive.

"Affectionately,

"Tuesday, Oct. 6, 92." WM."

Q. That was received by messenger?

A. The letters were laying in the house, and his wife took charge of them. She handed it to me.

Q. Of course you are aware that if the insurance policies are collected that this amount of $86,736 will all be recoverable by you?

A. Only the $40,000. The other has been paid out of the estate, if I understand right. He paid out of the estate, out of the insurance he received, all he could, and when he could not pay any more I saw proper to settle the thing up.

No cross examination.

Signature waived.